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The Court of Session as a European Union Court? The example of the challenge to the minimum price on alcohol legislation

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The preliminary reference procedure has represented a powerful tool for maintaining the unity and consistency of EU law in cases in which domestic courts were called upon to interpret and apply the Treaties and other union rules. Thanks to this procedure, the Court of Justice of the EU has been successful in construing an egalitarian relation of cooperation with the domestic judiciaries, by assisting them in the day to day administration of justice and at the same time seeking to empowering them to apply EU law rules autonomously and confidently. However, how to strike a balance between the demands of unity and consistency in the interpretation of Union law and respecting the independence of the judiciary has been a constant question for the Court as well as for the domestic judges: how far should they “trust their expertise” and therefore, by relying on the EU precedent, decide cases involving EU law questions on their own? And what cases are instead best being dealt with only after the EU Court of Justice has had the opportunity to “have its say” and advise the domestic courts?

The doctrine of *acte clair*, which was enunciated by the EU Court in the *CILFIT* case, represents a clear example of how difficult it can be to answer this question, in light of the “peculiar features” of EU law, of its “multi-lingualism” and, paramount, of the need to maintain its inner coherence and consistency.

Equally complex questions arise for domestic courts, whenever they are asked to raise a reference to the EU court in Luxembourg: the dictum of Lord Denning in *Bulmer v Bollinger* may sound like the expression of 1970s scepticism vis-a-vis the “Common Market”, which could be breathed in many circles after the UK had acceded to the European Economic Community. However, it seems to harbour deeper concerns for the independence of the judiciary, the demands of delivering justice to claimants quickly and within acceptable financial limits and the corresponding need to allow the EU Court of Justice to discharge its “cooperative function” in respect of the most relevant and “novel” questions of Union law.

The recent decision of Lord Doherty on the challenge brought by the Scotch Whisky Association against the Scottish legislation introducing minimum pricing on alcohol sales represents another example of this carefully crafted, yet still relatively nuanced relationship. As is well known, the legislation in issue was challenged via judicial review on the ground that, *inter alia*, it had infringed Articles 34 and 36 TFEU, concerning the freedom of movement of goods and laying down strict requirements according to which Member States could interfere with this principle. In a landmark decision for the compatibility of public-health related constraints on the freedom of traders to set their prices according to their cost structure, Lord Doherty, for the Court of Session, was asked, among other questions, to make a reference to the EU Court of Justice on the question of whether the challenged measures represented a “proportionate” restriction on the freedom of movement, in light of Article 36. He was consequently faced with an alternative: should he act as a “Union judge” and therefore rely on the existing and rather copious precedent on these questions to decide the case? or should he resort to the assistance of the EU Court?

Lord Doherty went for the former: in a terse couple of paragraphs he explained why he felt able to address the question and respond to it “with complete confidence; he expressed the view that “there [was] no issue of legal interpretation of [Article 36] which required elucidation”. In that respect Lord Doherty emphasised that domestic courts were “better placed” vis-a-vis the Court in Luxembourg when it came to examining “all the circumstances

bearing upon proportionality” and emphasised that, due to the “supervisory nature” of the EU Court’s jurisdiction, it fell on the domestic judge, in accordance with the requirements of article 36 TFEU, to identify the goals of the legislation, the “appropriateness” of the measures being enacted and the “proportionality” vis-a-vis the goals being pursued.

On that basis, Lord Doherty rejected the petitioners’ plea for a preliminary reference: he held that, in accordance with the long-standing approach adopted in *inter alia* *ex p. Else (R v International Stock Exchange of the UK and Ireland Ltd ex p. Else, [1993] QB 534 at 545-546)*, a domestic court should only make a reference to Luxembourg if it felt unable to decide on the case “with complete confidence”, after having found all the facts and identified a “question of EU law” that was “critical” to the outcome of the case, in light of factors such as “(...) the differences between national and Community legislation, the pitfalls which face a national court venturing into what may be an unfamiliar field, the need for uniform interpretation throughout the Community and the great advantages enjoyed by the Court of Justice in construing Community instruments” (per Lord Bingham, p. 545).

However, as the Court of Session’s decision shows, none of the issues at stake in the challenge to the Minimum Pricing legislation were such that the domestic court could not decide “with complete confidence”: it should be emphasised that already at the start of his decision, Lord Doherty made clear that the task of a domestic court charged with dealing with a question of EU law was in all similar to the “supervisory jurisdiction” enjoyed by the EU Court of Justice and in that context held that it should be primarily for the domestic court to consider whether the challenge brought against the domestic measure was “well-founded”. He also emphasised the importance of respecting the “margin of discretion” recognised to the national authorities (see para. 48-49) and especially to defer to the parliamentary deliberations in this area (see para. 79). On that basis, and relying on the EU Court of Justice’s precedent on these issues, Lord Doherty felt “sufficiently confident” to assess the legislation under challenge and to provide an answer to the EU law questions before him.

By looking at this judgment, one cannot help but think that this is an aspect of the “acte clair” doctrine in action: it may be recalled that in *CILFIT* the EU Court of Justice had affirmed that the domestic courts before which a “question of EU law” was pending, which was “relevant” for the decision of a specific case, could refrain from making a reference if it thought that the “answer was so obvious as to leave no reasonable doubt” as regards what its solution should be; in that context, the court emphasised that this would be the case if the same question had been dealt with in an earlier case (although the facts or the nature of the proceedings were not exactly identical). Against this background, it is suggested that the challenge of alcohol minimum pricing legislation constitutes one such case: the Court of Session, acting like a proper “Union court, relied on the existing *acquis* in order to address a sensitive question, after having dealt with all the questions of fact and taking into account the “margin of discretion” to be accorded to the domestic authorities responsible for judgments that were “policy-laden” in their essence. As paragraphs 106 and 107 indicate, had the Court of Session been unable to give “its own answer”, a reference may have been justified. However, as Lord Doherty’s careful consideration of the issues shows, petitioning the Court in Luxembourg when the domestic judge could clearly adopt his own conclusions, in light of established principles and of a clear factual picture, was not necessary.

Over the years, the Scottish Courts have been criticised for the paucity of the references they made to the EU Court of Justice: however, in light of this recent decision, one may perhaps be forgiven for thinking that this is the consequence of “Euro scepticism” among Scottish judges! To the contrary, if Lord Doherty’s careful assessment of the compatibility of the Alcohol (Minimum Pricing) (Scotland) Act is anything to go by, it could be argued that the small number of references made so far can be explained as a consequence of the willingness of the Court of Session (and perhaps of the Scottish Courts generally) to engage actively with the EU law *acquis* and to apply complex principles to the cases pending before it before seeking guidance from the Luxembourg court. Could this be a sign of things to come for the future—in other words, greater confidence on the part of domestic courts to act as “Union courts” in the course of their day-to-day administration of justice? Surely it seems that Scotland could

“blaze a trail” in this area.

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